IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA AD 2012.

CORAM: ATUGUBA, AG. C.J (PRESIDING)
AKUFFO,(MS.) J.S.C.
DATE-BAH, J.S.C.
OWUSU, (MS.)J.S.C.
ANIN-YEBOAH, J.S.C.
GBADEGBE, J.S.C.
AKOTO-BAMFO (MRS), J.S.C.

WRIT
No. J1/1/ 2012

9TH MAY 2012

JANET NAAKARLEY AMEGATCHER PLAINTIFF

VRS

1. ATTORNEY-GENERAL --- DEFENDANTS
2. THE SPEAKER OF PARLIAMENT
3. THE ELECTORAL COMMISSION
4. THE MINISTER OF LOCAL GOVERNMENT

R U L I N G

ATUGUBA, J.S.C:

On 6/2/2012 the plaintiff issued a writ invoking the original jurisdiction of this court claiming in effect that the newly created District Assemblies are unconstitutional.

On 29/2/2012 the question arose as to whether having regard to the provisions of article 88(1) and (5) the Speaker of Parliament and the Minister of Local Government have been properly joined to this action.

Article 88(1) and (5) are as follows:

> " 88. (1) There shall be an Attorney-General of Ghana who shall be a Minister of State and the principal legal adviser to the Government.
>
> (5) The Attorney-General shall be responsible *for the institution and conduct of all civil cases on behalf of the State; and all civil proceedings against the State shall be instituted against the Attorney-General as defendant.*" (e.s.)

The contentions of Mr. Nene Amegatcher are varied but the main thrust of them is his contention that

> "*... the Attorney-General was never intended to act as legal counsel for the other two organs of State namely the Legislature and the Judiciary as well as independent State institutions.* This is because our constitutional scheme clearly envisages *situations where the interests of these constitutional organs can be antithetical to each other resulting in controversies that implicate serious questions of balances of power.* It is inequitable, or even immoral in such situations for the Attorney-General to be legal adviser for the executive branch and other organs of State." (e.s.)

The main stance of the Attorney-General on the other hand is that article 88(5) is clear and unambiguous and must be given its full effect.

We are of the opinion that neither party is absolutely right as to his position on this matter. By far the most definitive pronouncement of this court on this issue is its decision in *Republic v. High Court, Accra; Ex parte Attorney-General (Delta Foods Ltd, Interested Party)* (1998-99) SCGLR 595 in which this court held that the Attorney-General is the proper party to sue and be sued on behalf of the State. However, it is discernible even from that decision that **this court did not give a raw application to article 88(5). It applied it in a purposive manner, resorting to the essence of the provision as opposed to its literal words.** In short this court held that **though the Minister of Food and**

Agriculture rather than the Attorney-General had been wrongly sued yet in all the circumstances of the case an amendment substituting the Attorney-General as defendant would meet the ends of justice, since, inter alia the suit had been conducted throughout by attorneys of the Attorney-General's Department.

The concerns of Nene Amegatcher arising from the position of the Attorney-General as a political appointee have been fully adumbrated by the Supreme of Court of Namibia in *Ex parte Attorney-General, Namibia: Re Constitutional Relations between the Attorney-General and the Prosecutor-General* (1995) LRC 507. The Court in this case gave a most extensive consideration and evaluation of the role of the Attorney-General particularly in the Commonwealth and noted that Ghana's Attorney-General belongs to Model 3, the type that gives the Attorney-General also the portfolio of Minister of Justice and is therefore a political minister. **In such a situation the court was most sceptical of any powers relating to law enforcement being entrusted to the Attorney-General.**

As laid down in the celebrated case of *Tuffour v. Attorney-General* (1980) GLR 634 C.A. (sitting as the Supreme Court) **the Constitution is an organic document capable of growth to meet the aspirations and needs of the Ghanaian society.** This principle has been stated in very moving terms by Le Dain J in the Canadian case of *R v. Therens* [1985] 1 SCR 613 at 638-639 and 677 and quoted with approval by Maxwell C.J. of the Western Samoa Supreme Court in *Reference by the Head of State* (1989) LRC 671 S.C. at 676.

Constitutional ramifications since the 1992 Constitution came into force lend support to Nene Amegatcher's aforesaid concerns. In *Nartey v. Attorney-General & Justice Adade* [1996-97] SCGLR 63 the Chief State Attorney appearing in the case for the 1st defendant, the Attorney-General informed the court, towards the end of the case that *"she had been instructed to inform the court that the first defendant would no longer contest the plaintiff's action.*"

In *J.H. Mensah v. Attorney-General* (1996-97) SCGLR 220 the Minority in Parliament took the view that ministers appointed by a President after an election required Parliamentary approval even if they were ministers in the immediately preceding term of the re-elected president, whilst the Majority and the then Attorney-General took the contrary view. It was the Minority Leader's action in this court that vindicated the Minority's view. In *Commission on Human Rights & Administrative Justice v. Attorney-General (No.1)* (1998-99) SCGLR 871 and *Attorney-General v. Commission on Human Rights and Administrative Justice (No. 2)* (1998-99) SCGLR 894 the parties locked horns as to the ambit of the Commission on Human Rights and Administrative Justice's powers under sections 34 and 35(2) of the Transitional Provisions and Chapter 18 of the 1992 Constitution. Some of these incidents keep recurring.

Consequently, we consider that the time has come for a realistic revisit to article 88(5). Accordingly we come down on articles 88(5) as follows. All the constitutionally established independent bodies like the Commission on Human Rights and Administrative Justice, The Electoral Commission, etc can sue and be sued on their own relating to their functions per counsel of their choice.

Any person affected by an action involving the State can upon application be joined to such action, to protect his or its interest. With regard to the Judiciary and the Legislature, where their position on an issue is in conflict with that of the Attorney-General they may proceed on their own by counsel of their choice. However, any of these bodies referred to may access the services of the Attorney-General if they so choose.

In the present case however there is nothing to show that Parliament and the Attorney-General have conflicting positions as to this action. The Minister of Local Government is manifestly a wrong party to this action. Accordingly, Parliament and the Minister of Local Government are struck out from this writ.

(SGD) W. A. ATUGUBA

ACTING CHIEF JUSTICE

AKUFFO [MS.] JSC;

I agree that, in this particular case, Parliament and the Minister of Local Government have been misjoined as parties and the two should be struck out as such.

(SGD) S. A. B. AKUFFO [MS.]
JUSTICE OF THE SUPREME COURT

DR. DATE-BAH JSC:

The plaintiff caused a writ to be issued against the defendants on the 6th February 2012, with the required Statement of Case, invoking the original jurisdiction of this Court. Counsel for the 1st, 2nd and 4th defendants then filed, on 24th February 2012, a motion for extension of time within which to file an answer to the plaintiff's Statement of Case. During the hearing of that motion, this Court raised the issue of the scope of article 88(5) and its impact on who may be made a party in suits against the State or the Republic. Counsel on both sides were then directed to file written submissions on the issue for the consideration of this Court. The substantive facts of the case are as stated admirably by my brother Atuguba JSC in his lead judgment and I adopt that statement.

This case exemplifies the fact that constitutional interpretation is often complex and may require the uncovering of layers of meaning by, so to speak, exegesis. This is because, as Sowah JSC said in *Tuffour v Attorney-General*, [1980} GLR 637, a constitution represents the aspiration of a people. His often-quoted observations on this issue (at pp. 647-8) were as follows:

> "A written Constitution such as ours is not an ordinary Act of Parliament. It embodies the will of a people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people's search for progress. It contains within it their aspirations and their hopes for a better and fuller life.
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> The Constitution has its letter of the law. Equally, the Constitution has its spirit. It is the fountain-head for the authority which each of the three arms of government possesses and exercises. It is a source of strength. It is a source of power. The executive, the legislature and the judiciary are created by the Constitution. Their authority is derived from the Constitution. Their sustenance is derived from the Constitution. Its methods of alteration are specified. In our peculiar circumstances, these methods require the involvement of the whole body politic of Ghana. Its language, therefore, must be considered as if it were a living organism capable of growth and development Indeed, it is a living organism capable of growth and development, as the body politic of Ghana itself is capable of growth and development. A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach [p.648] to interpretation would not do. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time.
>
> And so we must take cognisance of the age-old fundamental principle of constitutional construction which gives effect to the intent of the framers

of this organic law. Every word has an effect. Every part must be given effect."

Thus, a literal reading of article 88(5) cannot be allowed to stand in the way of the aspiration of the people, expressed in an acknowledged core value of the Constitution. If the plain meaning of a constitutional text runs counter to a core value of the Constitution, it calls for reflection and a purposive interpretation to reconcile the particular core value or aspiration of the people with the language employed in the text with a view to extracting a meaning by a process of interpretation that expresses the spirit of the Constitution.

One of the fundamental principles of the 1992 Constitution is that of separation of powers between the Executive, the Legislature and the Judiciary. Although the separation is not absolute, it is one of the cornerstones of the Constitution. Another fundamental principle is that of checks and balances, according to which certain bodies created by the Constitution are given relative autonomy to enable them to maintain oversight responsibility over other organs of State. It follows that the Constitution should be so construed as to preserve and not undermine these fundamental principles. Yet the plain meaning of article 88(5) has the potential to undermine these principles. Article 88(5) provides that "all civil proceedings against the State shall be instituted against the Attorney-General as defendant". Does this mean that every civil action against any organ or institution of the State has to be brought against the Attorney-General, who is in fact a member of the Executive? Does this not compromise the principle of separation of powers? What happens if the Attorney-General wants to sue the Speaker or the Chief Justice? Must he sue himself? If a member of the Attorney-General's political party sues the Chief Justice, can the Attorney-General compromise the suit, since he is the nominal defendant, irrespective of the wishes of the Chief Justice? These are but a few of the many troubling issues that arise from a literal reading of article 88(5). How are these issues to be resolved?

The opinion read by my learned brother, Atuguba JSC, represents a brilliant pragmatic purposive interpretation to reconcile the public interest requirements of the context of article 88(5) with the plain meaning of the provision and I fully agree with it. I only wish to add a few words by way of further explanation of the position that this court has taken.

The plain meaning of article 88(5) is given effect through the interpretation that the presumptive rule is that the Attorney-General is to be the defendant in all civil proceedings against the State. However, there are exceptions to this presumptive rule, necessitated by the core values of the Constitution and the overriding constitutional need to avoid conflicts of interest. The exceptions are meant to buttress the autonomy of the independent organs of the State. There has in fact been the practice of allowing the legal persons referred to popularly as the "constitutional bodies" to be sued in their own name. Thus there are judicial precedents showing that the Commission on Human Rights and Administrative Justice, the Electoral Commission and the National Media Commission may be sued in their own name and not through the Attorney-General. This practice is endorsed and affirmed as being in consonance with the position taken by this Court today. Furthermore, applications may be made in respect of other State organs to this Court in relation to specific cases for leave for these organs to be allowed to sue or be sued in their own name, in order to avoid conflict of interest.

On the particular facts of this case, however, there is no justification for bringing any of the other State organs within the exceptions to article 88(5) carved out by our interpretation. By practice, it is accepted that the Electoral Commission can be made a party, but there is no cause of action demonstrated against it independently by the facts pleaded in this case. Given the facts pleaded, the general rule under article 88(5) applies and the only defendant should be the Attorney-General. This is because the action brought by the plaintiff seeks to challenge the constitutionality of certain provisions in the Local Government Act, 1993 (Act 462) and the multiple State organs specified

in the Writ of Summons are not needed to enable this Court to do justice on the facts of this case.

(SGD) DR. S. K. DATE-BAH
JUSTICE OF THE SUPREME COURT

(SGD) R. C. OWUSU [MS.]
JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

(SGD) N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO – BAMFO [MRS.]
JUSTICE OF THE SUPREME COURT

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JAMES QUASHIE – IDUN [WITH HIM ANTHONY DABI] FOR THE 3RD DEFENDANT.